



Federal Communications Commission
Washington, D.C. 20554

April 25, 2019

In Reply Refer To:
1800B3-AS

WKNG, LLC
c/o Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, NW
Suite 301
Washington, DC 20016

In re: **W255CJ, Atlanta, Georgia**
Facility ID No. 148550
File No. BSTA-20180810ABA

Dear Counsel:

In a February 21, 2019, letter the Media Bureau granted the application to renew the broadcast license of FM translator station W255CJ, Atlanta, Georgia (Station) and the application of Cumulus Licensing, LLC (Cumulus) for a license to cover construction of modified facilities.¹ The *Letter Decision* inadvertently omitted discussion of WKNG, LLC's (WKNG) Motion to Dismiss Cumulus' application for license renewal.² In the Motion, WKNG alleged that Cumulus, the licensee of the Station, continued to violate the Commission's *ex parte* rules by improperly soliciting *ex parte* presentations in violation of 47 CFR § 1.1210,³ even after the Associate General Counsel admonished Cumulus to stop doing so.⁴ After consultation with the Office of General Counsel, the Media Bureau concludes that no continuing violation of the solicitation rule occurred and dismisses the Motion as moot.

In the Motion, WKNG submitted what it characterized as a screenshot of the Station's website taken October 10, 2018, a month after the Associate General Counsel's Order.⁵ WKNG states that this reveals that "the solicitation on the website is precisely the same as the solicitation that had been in place since at least April 26, 2018, when counsel first discovered it."⁶ In its Opposition, Cumulus explained that it did not continue to solicit listener presentations and that the screenshot submitted by WKNG did not accurately reflect the Station's website. Cumulus noted that it intended to take down the page on its

¹ Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau to John Garziglia, Esq., Michael D. Basile, Esq., and Mark B. Denbo, Esq., ref 1800B-IB (Feb. 21, 2019) (*Letter Decision*).

² Motion to Dismiss filed on October 12, 2018, by WKNG, LLC (Motion). Cumulus filed an Opposition to Motion to Dismiss on November 1, 2018 (Opposition). WKNG filed its Reply to Opposition to Motion to Dismiss on November 13, 2018.

³ The section provides that "No person shall solicit or encourage others to make any improper presentation under the provisions of this section." 47 CFR § 1.1210. *Ex parte* presentations (including emails not served on all parties to a proceeding) are prohibited in restricted proceedings. 47 CFR §§ 1.1202(b); 1.1208.

⁴ Memorandum Opinion and Order, DA 18-924 (Assoc. Gen. Counsel Sept. 7, 2018) (Order).

⁵ Motion at 2 and Exhibit B.

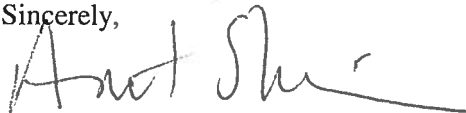
⁶ *Id.* at 2.

website soliciting viewer comments but accidentally left a version of the page on its site that could be accessed using a search engine.⁷ Cumulus included with the Opposition a detailed statement by the web designer explaining how the material was accidentally left on the Station website.⁸

We accept Cumulus assertion that the draft page was not knowingly or intentionally made available to the public and should not be considered a solicitation. We do not equate the accidental availability of the page with a continuing intent to solicit comments in violation of the rule. Solicitation requires an intent that the substantive offense be committed.⁹ Cumulus' actions taking down the version of the webpage that it intended for the public to see refute any inference that it intended that further presentations take place. Also, we do not find that any of Cumulus' statements were misrepresentations or lacking in candor.

Accordingly, IT IS ORDERED that the Motion to Dismiss, filed on October 12, 2018, by WKNG, LLC IS DISMISSED.

Sincerely,



Albert Shuldiner
Chief, Audio Division
Media Bureau

cc: Andrew S. Kersting, Esq.
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⁷ Opposition at 4.

⁸ *Id.* at Exhibit A. In his sworn declaration, Devyn Tucker, the Interactive Web Designer for Cumulus, explains that the solicitation page was removed from the Station's website on June 6, 2018 (after WKNG's initial Petition and before the Associate General Counsel's Order). The screenshot taken by WKNG on October 10, 2018 was of a draft page not intended to be displayed on the website but incidentally saved on the backend of the website. Tucker states that he did not realize that even though the draft page had been saved as a layout, it could be accessed by a search engine, such as Google, or by entering the URL directly in a web browser. Tucker states that he did not learn that the draft template was accessible until John Petrini, Cumulus' Director of Marketing and Media for the Atlanta-area radio stations informed him of WKNG's Motion, at which time (October 13) Tucker deleted the draft layout.

⁹ See, e.g., *Landero-Guzman v. Holder*, 344 Fed.Appx. 454, 455 (9th Cir. 2009).